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No. 03-238

In The Supreme Court of the United States

BURL CAIN, TOM NORRIS, RICHARD PEABODY, MAJOR R. RACHAL, COLONEL SAM SMITH and MAJOR PAUL J. MEYERS,

Petitioners,

v.

ROBERT KING WILKERSON, ALBERT WOODFOX, and HERMAN WALLACE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

The prison officials state that the sole question presented by their Petition is whether the Fifth Circuit was correct in rejecting petitioners' argument that *Sandin v. Conner*[1] added an additional prong (the "atypical and significant hardship" inquiry) to the pre-existing liberty interest analysis.[2]

The Fifth Circuit's ruling does not raise the question presented by the Petition. Instead, the Fifth Circuit's narrowly drawn decision focused solely on whether the inmates' confinement in extended lockdown resulted from their initial classification or from violations of prison rules. The Court did not address how the *Sandin* analysis applied to the inmates' confinement.

The prison officials also attempt to create a circuit split where no such split exists. The prison officials allege that some circuits have interpreted *Sandin* by looking only as to whether "atypical and significant hardship" exists (the "replacement test") whereas other circuits have interpreted *Sandin* as requiring, in addition to "atypical and significant hardship," that the State create an entitlement by mandatory language (the "additional prong" test). The alleged circuit split rests upon prison officials' misreading of *Sandin* and the circuit court decisions. *Sandin* and the circuit court decisions do not employ different tests for similar deprivations. Instead, *Sandin* sets forth a "sliding scale" analysis which looks to the nature of the deprivation and employs different tests

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[1] 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995).

[2] Pet. at i.

depending upon the severity of the deprivation. All of the decisions cited by the prison officials were decided within the framework of *Sandin*'s "sliding scale" analysis.

Additionally, the prison officials urge this Court to come full circle and re-embrace the rules-based approach that this Court abandoned in *Sandin*. Rather than eliminating the undesirable effects claimed by the prison officials, a return to rules-based approach would resurrect the problems that led this Court to decide *Sandin* in the first place.

There is no circuit split and the Fifth Circuit did not take sides in a circuit split even if such a split exists. Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

FACTS

This case presents the extraordinary – and possibly unique – circumstance of inmates being kept continuously in extended lockdown for decades. Two of the plaintiffs, Herman Wallace and Albert Woodfox, were placed in extended lockdown in 1972 after the murder of a prison guard. Wallace has remained continuously in extended lockdown for the last thirty-one years. Woodfox has been continuously in extended lockdown since 1972 except for a three year period when he was incarcerated in a parish jail. It appears likely that without judicial relief Wallace and Woodfox will remain in extended lockdown for the rest of their lives.

With regard to the third plaintiff, Robert Wilkerson, the prison officials err at page four of their Petition where

they state that Wilkerson was placed in extended lockdown for killing a fellow inmate. Wilkerson was first placed in extended lockdown in May 1972 approximately two weeks after his arrival at Angola.[3] Over a year later, on September 14, 1973, Wilkerson was indicted for the murder of a fellow inmate.[4] Wilkerson was convicted of the murder and remained continuously in extended lockdown until 2001 when he was released from prison after the Fifth Circuit granted Wilkerson's second habeas corpus petition.[5]

I.

THERE IS NO SPLIT IN THE CIRCUITS AS TO THE PROPER INTERPRETATION OF *SANDIN*.

A. *Sandin*'s "sliding scale" analysis.

The prison officials have sought to create a circuit split where no such split exists. The prison officials allege that some circuits have interpreted *Sandin* by looking only as to whether "atypical and significant hardship" exists (the "replacement test") whereas other circuits have interpreted *Sandin* as requiring, in addition to "atypical and significant hardship," that the State create an entitlement by mandatory language (the "additional prong" test).

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[3] *Wilkerson v. Maggio*, 703 F.2d 909 (5th Cir. 1983).

[4] *State v. Brewer*, 301 So.2d 630 (La. 1974).

[5] *Wilkerson v. Cain*, 233 F.3d 886, 889 (5th Cir. 2000) (A successive habeas corpus petition will be granted only if the petitioner can prove that he is "actually innocent" of the crime of conviction).

The alleged circuit split rests upon the prison officials' misreading of *Sandin* and the circuit court decisions. *Sandin* and the circuit court decisions do not employ different tests for similar deprivations. Instead, *Sandin* sets forth a "sliding scale" analysis which looks to the nature of the deprivation and employs different tests depending upon the severity of the deprivation:

> Level 1. Deprivations that are not severe or are closely related to the original terms of confinement will not be considered as impinging upon a liberty interest even though state law or regulations may contain "mandatory language." *Sandin*, 515 U.S. at 481, 482, 115 S.Ct. at 2297, 2298.
>
> Level 2. Deprivations that impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" may be considered as impinging upon a liberty interest provided that state law creates a liberty interest. *Sandin*, 515 U.S. at 479, 115 U.S. at 2300.
>
> Level 3. Deprivations that are so severe that they exceed the inmate's sentence "in such an unexpected manner as to give rise protection by the Due Process Clause of [their] own force" give rise to a liberty interest irrespective of state law. *Sandin*, 515 U.S. at 479-80, n.4, 484, 115 S.Ct. at 2297, n.4, 2300.

No decision cited by the prison officials acknowledges a circuit split. In order to give the impression of a circuit split, the prison officials quote isolated portions of various decisions without analyzing the bases upon which the circuits made their respective decisions. An analysis of the courts' actual rulings discloses no such split and that the

circuits are faithfully following *Sandin*'s "sliding scale" analysis.

B. The Second and Third Circuit decisions cited by the prison officials were decided within *Sandin*'s "sliding scale" framework.

The Second and Third Circuit decisions cited by the prison officials are either not applicable at all or can be categorized as Level 1, Level 2 or Level 3 deprivations within *Sandin*'s "sliding scale" framework.[6]

In *Frazier v. Coughlin*,[7] the Second Circuit determined that the inmate failed to demonstrate a significant deprivation of a liberty interest because he did not show that his confinement in a segregated housing unit for twelve days was "dramatically different from the 'basic conditions of [his] indeterminate sentence.'"[8] This was a Level 1 deprivation because it did not constitute "atypical and significant hardship" even if state law or regulations contained mandatory language.

Tellier v. Fields[9] was a Level 2 case. The Second Circuit found that the inmate could establish a liberty

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[6] One Second Circuit decision cited by the prison officials is completely inapposite to the present case. *Anderson v. Recore*, 317 F.3d 194 (2nd Cir. 2003). In that case the State revoked an inmate's temporary release status and reincarcerated him without a hearing. The Second Circuit held with regard to work release programs, this Court's decision in *Young v. Harper*, 520 U.S. 143, 117 S.Ct. 1148, 137 L.Ed. 270 (1997) had supplanted the *Sandin* analysis.

[7] 81 F.3d 313 (2nd Cir. 1996).

[8] *Id.* at 317.

[9] 280 F.3d 69 (2nd Cir. 2000).

interest because "a confinement of 514 days under conditions that differ markedly from those in the general population" was "atypical and significant."[10] The Second Circuit also found that the inmate was entitled to the process required by the language of the Code of Federal Regulations.[11]

Torres v. Fauve[12] was a Level 1 case where the Third Circuit held that 15 days in disciplinary detention and 120 days in "administrative segregation" was not "the type of atypical, significant deprivation in which a State might conceivably create a liberty interest."[13]

C. The Seventh, Eighth, Tenth and D.C. Circuit decisions cited by the prison officials were decided within *Sandin*'s "sliding scale" framework.

All of the Seventh, Eighth, Tenth and D.C. Circuit decisions cited by the prison officials either did not involve liberty interests or can be categorized as Level 1, Level 2 or Level 3 deprivations within *Sandin*'s "sliding scale" framework.

Hatch v. District of Columbia[14] presented the issue as to whether a seven month confinement in administrative segregation constituted a Level 1 or Level 2 deprivation.

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[10] *Id.* at 80.

[11] *Id.* at 81.

[12] 292 F.3d 141 (3rd Cir. 2002).

[13] *Id.* at 151, citing *Sandin*, 515 U.S. at 486, 115 S.Ct. at 2293.

[14] 184 F.3d 846 (D.C. Cir. 1999).

The D.C. Circuit held that the District of Columbia regulations limited official discretion to place prisoners in segregative confinement. However, the Court remanded the case for a determination as to the appropriate baseline to evaluate whether the inmate's administrative segregation constituted "atypical and significant hardship."[15]

The two Seventh Circuit decisions cited by the prison officials concerned Level 1 deprivations. *Rowe v. Shake*[16] concerned alleged delays in incoming mail to a prisoner. The Court ruled that no liberty interest was involved based on *Sandin*'s holding that regulations alone cannot amount to a deprivation of liberty. In *Hanks v. Wagner*[17] the Seventh Circuit ruled that a transfer to another prison within the State did not constitute a deprivation of liberty.[18]

In *Hake v. Clarke*,[19] an inmate claimed that he was unconstitutionally denied a transfer from minimum security to community custody. Inasmuch as the district court decision had been rendered prior to *Sandin*, the Eighth Circuit simply remanded the case for "an analysis of *Sandin*."[20]

Neither of the Tenth Circuit decisions cited by the prison officials involved liberty interests. In *Cosco v.*

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[15] *Id.* at 858.

[16] 196 F.3d 778 (7th Cir. 1999).

[17] 128 F.3d 1173 (7th Cir. 1997).

[18] *Id.* at 1174.

[19] 91 F.3d 1129 (8th Cir. 1996).

[20] *Id.* at 1132.

Uphoff,[21] the plaintiffs asserted that the mandatory language in regulations governing what prisoners could keep in their cells created a property interest; they made no allegation as to any impingement of their liberty interests.[22] In *Riddle v. Mondragon*,[23] sex offenders complained that they were not included in certain programs such as "minimum" custody release, work release and community corrections. The Tenth Circuit held that the failure to include sex offenders within the challenged policies should be analyzed as a denial of equal protection, not as a denial of due process under *Sandin*.[24]

II.

THIS COURT SHOULD REJECT THE PRISON OFFICIALS' PLEA TO RETURN TO THE *HEWITT* RULES-BASED APPROACH WHICH THIS COURT ABANDONED IN *SANDIN*.

Prior to *Sandin* the courts looked to the language of state regulations to determine whether they bestowed an entitlement.[25] This Court noted that in *Sandin* that such a "rules-based" approach had negative consequences:

> By shifting the focus of the liberty interest inquiry to one based on the language of a particular regulation, and not the nature of the

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[21] 195 F.3d 1221 (10th Cir. 1999), *cert. denied*, 531 U.S. 1081, 121 S.Ct. 784, 148 L.Ed.2d 680 (2001).

[22] *Id.* at 1222.

[23] 83 F.3d 1197 (10th Cir. 1996).

[24] *Id.* at 1206.

[25] *Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864 (1983).

> deprivation, the Court encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges.
>
> * * *
>
> *Hewitt* has produced at least two undesirable effects. First, it creates disincentives for States to codify prison management procedures in the interest of uniform treatment . . . States may avoid creation of "liberty" interests by having scarcely any regulations, or by conferring standardless discretion on correctional personnel.
>
> Second, the *Hewitt* approach has led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little off-setting benefit to anyone.

Sandin, U.S. at 480-82, 115 S.Ct. at 2299-2300.

Ironically, the prison officials here urge this Court to return to the *Hewitt* rules-based analysis:

> the "additional prong" theory advanced by the prison officials allows the courts to resolve the inmates' procedural due process claims by examining the 2 short prison rules identified by the inmates as the source of their liberty interest in release from lockdown.[26]

Thus, the prison officials urge this Court to come full circle and re-embrace the rules-based approach which this Court abandoned in *Sandin*. Rather than eliminating the

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[26] Pet. p. 17.

undesirable effects claimed by the prison officials, a return to *Hewitt's* rules-based approach would resurrect the problems that led this Court to decide *Sandin* in the first place.

III.

THE FIFTH CIRCUIT DID NOT TAKE SIDES IN A CIRCUIT SPLIT.

The Fifth Circuit took no definitive position as to how *Sandin* applied in the present case. Although the Court affirmed the district court's order denying the prison officials' Motion to Dismiss, it was on the basis that the Court could not determine whether the inmates asserted sufficient facts that would give rise to a denial of a liberty interest. The Fifth Circuit held that the district court must first determine whether the inmates' confinement in extended lockdown resulted from their initial classification or from violations of prison rules:

> In resolving the nature of the liberty interest and the process that is due for confinement of prisoners in extended lockdown under these circumstances, it is crucial to know whether, based on their crimes of conviction, the inmates' confinement is the result of an initial classification by prison officials as opposed to confinement for violations of less serious prison disciplinary rules.[27]

The Fifth Circuit took no position as to whether the *Sandin* test applied in the present case. The Court simply held that:

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[27] Pet., App. A at 8.

> if the inmates confinement in extended lockdown is not the result of their initial classification, the *Sandin* test would be triggered.[28]

Since the focus of the Fifth Circuit's decision was whether the inmates' confinement in extended lockdown resulted from their initial classification or from violations of prison rules, the Court did not address the nature of the deprivation itself nor did it rule as to how the deprivation should fit in the *Sandin* analysis. Therefore, the Fifth Circuit did not take sides in a circuit split even if such a split exists.

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[28] Pet., App. A at 9.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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